92-1221

NO. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

ARTHUR HIRT, ONALEE HIRT and
HOBART HIRT,

Petitioners,

vs.

CITY OF STRONGSVILLE, OHIO,
a Municipal Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED

When a zoning ordinance restricts the use of real property to office uses which effectively precludes the reasonable economic use of the property, is the zoning valid if it advances a legitimate governmental interest without providing a method of compensating the property owner for the elimination of its economic usefulness?

LIST OF PARTIES

All parties are identified in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Arthur Hirt, Onalee Hirt and Hobart Hirt, plaintiffs in the action below, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

This action was commenced by the filing of a complaint for declaratory judgment, injunctive relief and relief under 42 U.S.C. § 1983 on January 12, 1989 against the City of Strongsville, Ohio, in the Cuyahoga County, Ohio, Court of Common Pleas. Petitioners sought a declaratory judgment that the single-family zoning on their property was unconstitutional in that it deprived them of all reasonable economic use of their property. On January 30, 1990, the trial court entered an agreed order finding the then-existing single-

family zoning on petitioners' property unreasonable, unlawful and void. (Appendix D) The City was given until March 16, 1990 to rezone the property. Notwithstanding this order of the Court, the Strongsville City Council did not rezone the property until March 27, 1990 when the property was rezoned to an office classification — OB (Office/Building).

A trial to the Common Pleas Court was held on April 16, 1990 to determine the reasonableness of the office zoning classification as applied to petitioners' property. On June 1, 1990, the trial court issued findings of fact and conclusions of law in which it found, *inter alia*, that the office zoning classification on the Hirt property "is economically prohibitive, unreasonably restrictive and in effect would condemn the property to non-development in the indefinite future" and was "clearly invalid beyond fair debate." The court concluded that the zoning ordinance, as applied to petitioners' property, was unconstitutional. (Appendix C)

The Eighth District Court of Appeals, Cuyahoga County, Ohio reversed the trial court's decision. The Court, in applying the standard announced by the Ohio Supreme Court in *Karches* v. *Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988), stated ". . . plaintiffs must demonstrate that the zoning classification denies them the economically viable use of their land without substantially advancing a legitimate government interest." (Appendix B, at page 6a) The appellate court found that petitioners failed to carry their "burden of proving, beyond fair debate, that the zoning classification of OB [Office] is unreasonable and not necessary to the health, safety and welfare of the City" and upheld the validity of the zoning ordinance as applied to petitioners' property. (Appendix B, page 6a)

By entry dated October 21, 1992, the Supreme Court of Ohio overruled petitioners' motion for an order directing the Court of Appeals to certify its record. (Appendix A)

JURISDICTION

The Supreme Court of Ohio's entry was dated October 21, 1992. That entry is reproduced in Appendix A. This petition is filed within ninety (90) days of October 21, 1992. The jurisdiction of this Court is founded upon 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of the Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983 and Chapter 1260 of the Codified Ordinances of Strongsville, Ohio. The pertinent language of these provisions is reproduced in Appendix E.

STATEMENT OF THE CASE

Petitioners Arthur, Onalee and Hobart Hirt own the subject property (the Hirt property), which consists of an undeveloped 42.6-acre site which fronts on the north side of Royalton Road in Strongsville, Ohio. The entire east side of the property, approximately 15 acres, consists of a very deep and heavily wooded ravine, approximately sixty (60) feet deep and three hundred feet across. (Tr. 24.) Until March 27, 1990, the Hirt property was zoned R1-75, which permits no development more intense than single-family detached residential units. Since that time it has been zoned for office use.

Royalton Road is a five-lane major arterial highway, serving both municipal and regional traffic throughout southwest Cuyahoga County. The Cleveland metropolitan area is immediately to the north of Strongsville in Cuyahoga County. The adjoining property to the west is zoned for multi-family development (RMF-1) and is developed accordingly with the 158-unit Village Square Apartments. One of the access drives from the apartment complex runs continuously adjacent to the subject site's western boundary. To the west of the Village Square Apartments is the City of Strongsville municipal complex of public buildings.

The property on the opposite side of Royalton Road, approximately 1,700 feet to the east, is zoned to permit the construction of a regional shopping center. The City of Strongsville Park extends the entire length of the site's northern boundary. To the east of the Hirt property is the recently constructed office of Central Reserve Life Insurance.

National Land Development Company (National Land) operates a national real estate development consortium that builds, among other things, office buildings, apartments, single-family subdivisions, condominiums and townhouses. (Tr. 17.) In 1986, National Land identified the Greater Cleveland area as a market with economic and development potential. After extensive research, National Land identified

Strongsville as one of the fastest growing communities in Cuyahoga County with "a very strong unrequited demand for multi-family housing." (Tr. 17-20.)

National Land's representatives met with Robert Hill, the Planning Director of Strongsville (and one of respondent's witnesses) to discuss the availability of land for multi-family development. Mr. Hill pointed out that the Hirt property was ideal for multi-family housing. (Tr. 19-20.) Mr. Hill's opinion was consistent with the City's 1968 Comprehensive Master Plan and the 1988 draft of the Strongsville Master Plan. (Tr. 20; 34-36; 63; 78; 139-140.) Following further research on the possible development of the Hirt property, in late 1987 and early 1988, National Land entered into two contracts to purchase the Hirt property, contingent upon it being rezoned from single-family residential to multi-family residential. (Tr. 20-21.)

On April 19, 1988, National Land, as agent for the Hirts, applied to the City of Strongsville for a zone change from R1-75 to RMF-1, which is a multi-family zoning district. On July 14, 1988, the Strongsville Planning Commission recommended approval of the zone change by a unanimous vote of 7-0. After extensive lobbying by local residents opposed to the zone change, City Council denied the zone change on December 5, 1988. (Tr. 27.)

Petitioners filed a complaint for declaratory judgment, injunctive relief and relief under 42 U.S.C. § 1983 on January 12, 1989, asserting that the then-existing single-family zoning was unconstitutional as applied to their property. After a determination by the trial court that the City's single-family zoning was unreasonable (Appendix D), the City Council rezoned the Hirt property to an office classification (OB — Office Building) on March 27, 1990.

Trial to the court was conducted on April 16, 1990. Robert Westendarp, Chairman of the Board of National Land, testified that after the City's denial of the application to

change the zoning to multi-family and the City's expressed desire to have the property developed as office, National Land "hired all sorts of experts" and conducted an extensive study to determine whether an office development would be feasible on that property.[1] (Tr. 29.) The study indicated that developing the property under the office zoning classification would not allow a reasonable economic use of the property. (Tr. 29; 38.)

The overwhelming testimony presented by the parties at trial demonstrated that the site in question is simply not able to be economically developed under the current office zoning. First, there is no market. (Tr. 38; 64; 77; 99.) Robert Westendarp testified:

> "Well, there are many reasons, the first of which is there is just no market. We can't rent them. The entire southwest corridor, which is what this area office building market is called, according to all of our research and the research of our experts is a flat market. There has been hardly any new development in the area. Absorption has been very small." (Tr. 29-30.)

In addition, petitioners' leasing consultant, Donald E. Lyden, testified that ". . . the building of an office building of any type would be uneconomical, unfeasible from a leasing standpoint. . . ." (Tr. 98.)

Second, the rental rates that would have to be obtained with new construction on that site are not obtainable in that area. (Tr. 31; 38-39; 99; 102-103.) Lyden testified that:

> "The market itself in the southwest and western market has primarily been the slowest in terms of

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[1] Westendarp testified that "with a successful office building project we make more money than we do building a successful multi-family project," therefore National Land was not opposed to exploring the development of the Hirt property under the Office zoning classification. (Tr. 29.)

> development. It has been the least expensive which in turn means the rent will not be as high. It therefore cannot support the type of office building you need to put down here in order to build a critical mass because you're starting from scratch." (Tr. 99.)

Lyden's opinion is supported by Grubb & Ellis's 1989 office market overview for this area that says "[t]he southwestern and western suburban markets remained relatively static with little construction and a small amount of absorption. As we have noted many times in the past, the comparatively low rental rate structure in these two areas does not justify new construction." (Tr. 103.)

Third, the site is not visible from the highway, the ravine that comprises over one-third of the total acreage is not conducive to office development and the services necessary to attract tenants to the area are not available. (Tr. 30; 77; 89-90.) The area is not the kind of business hub that attracts the type of office development that would be needed on the Hirt property, nor does the area have the capabilities or potential for such business development. (Tr. 89; 122; 132.)

Fourth, financing for an office development on the Hirt property is not available, primarily because of its location and physical characteristics. (Tr. 31; 101.) As Lyden testified, "[s]o one leads to the other. Without tenants, you can't finance, and without financing, you can't build." (Tr. 101.)

Petitioners' witnesses were in agreement that as zoned for office, the Hirt property could not be economically developed and, therefore, would not be developed at all in the foreseeable future.[2] (Tr. 38; 54; 64; 77; 92-93; 98; 124-25; 132; 141; 146.)

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[2] In addition to Mr. Westendarp, petitioners' witnesses included a city planning consultant (Tr. 61), a leasing consultant with a company that completes over 70 percent of the brokered office lease transactions in the Cleveland market (Tr. 96), a real estate appraiser who has worked in the Greater Cleveland area since 1952 (Tr. 117), and a professor of urban planning from Cleveland State University (Tr. 136).

In addition, the City's own comprehensive master plans identified this land as a multi-family site. The 1968 plan and the 1988 draft of the Strongsville Master Plan present the site as being appropriate for multi-family. (Tr. 20, 63-64, 78.) Mr. Hill, Strongsville's City Planner, admitted that nowhere in the plan is there any recommendation that the property be zoned for office purposes. (Tr. 192.) In fact, the 1988 draft of the Master Plan states that "Strongsville's overall business potential in relation to its total acres of currently zoned business land implies that rezoning of more business land at Highway 82 and Fallingwater [near the Hirt property] would be highly speculative." (Tr. 35.) Not until the 1989 draft of the Master Plan, which occurred after City Council's denial of petitioners' zone change request, was anything other than multi-family recommended for this property.

At trial, the City attempted to show through its two expert witnesses that the property could be developed as a satellite office center to the proposed shopping mall across Royalton Road from the Hirt property or as a single tenant office development like the Central Reserve Life headquarters to the east of the Hirt property.[3] Petitioners' experts testified that neither of these propositions was supportable in light of the specific characteristics of the Hirt property.

In relation to the shopping mall which has been in the planning stages since the mid-1970's but never built, it is simply too remote from the Hirt property to encourage office development. David Hartt testified that the presence of a shopping center to the east of the property does not necessarily make the property suitable for office use. (Tr. 86.) Furthermore, he stated that the Hirt property was too remote from

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[3] It is important to note that both of respondent's witnesses were city planners. Respondent never presented evidence from developers, market analysts, leasing consultants or real estate appraisers to support these opinions. Respondent's planner, Robert Hill, and its expert, Mr. Gould, testified on cross-examination that their opinions were not based on any study of the market for offices.

the shopping center for satellite office development to occur. (Tr. 93-94.) Petitioners' leasing expert, Donald Lyden, testified:

> ". . . But, the problem is that you still need tenants, and we just do not see tenantry flowing to that area simply because of a shopping mall across the street." (Tr. 112.)

Finally, respondent contends that the presence of the Central Reserve Life Headquarters building to the east of the property encourages office development. This, too, was rebutted by competent, credible testimony from petitioners' witnesses. Richard Van Curen, a real estate consultant in Greater Cleveland and Northern Ohio since 1952, testified that:

> "That is not a building [Central Reserve Life] that is large enough by itself to give this area what the office people call critical mass, to make it a real office building center. It is for office use. It is better with it there than without it, but still in and of itself is not enough to make a difference." (Tr. 128-129.)

Mr. Hartt stated that, considering the development trends and the other available office sites, "the conclusion is it is not a suitable site for office development." (Tr. 85-86.) In addition, petitioners' witnesses stated that the likelihood of a headquarters office development was very slim and that offices of any type would not be reasonable for this site. Mr. Lyden stated:

> "We told them that the building of an office building on this site of any type would be uneconomical, unfeasible from a leasing standpoint, and it would not be generally a smart idea." (Tr. 98.)

Furthermore, Mr. Lyden testified that it would be very unlikely for another corporation to build its headquarters in

Strongsville. He stated that Strongsville was actually less attractive for that type of development. (Tr. 113-114.) The chance that a corporate officer would decide to relocate a corporate headquarters on the Hirt property is, at best, "highly improbable . . . under the circumstances." *Ketchel* v. *Bainbridge Twp.*, 52 Ohio St.3d 239, 243-44, 557 N.E.2d 779 (1990), *cert. denied*, 111 S.Ct. 1073 (1991).

The City's experts, two city planners, testified that, from a pure planning point of view, office zoning was an appropriate use for the Hirt property.[4] (Tr. 168; 213.) Both planners admitted on cross-examination that they did not review any of the economic considerations for developing the Hirt property under the office zoning classification. (Tr. 189-90; 218-19.)

Following trial to the court on the constitutionality of the office zoning, the court determined that:

> "in light of all the attending factors, the present zoning restrictions on the Hirt property to office development only is economically prohibitive, unreasonably restrictive and in effect would condemn the property to non-development in the indefinite future."

(Appendix C, page 13a.)

The trial court concluded that petitioners' "land could not be profitably developed as single or multi-office space in the foreseeable future; that the zoning ordinance as applied to the plaintiff (sic) is clearly invalid beyond fair debate." (Appendix C, page 14a.)

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[4] Petitioners do not contest this assertion. In fact, David Hartt, petitioners' city planning consultant, testified that "if you are only looking at the site's proximity to the highway and the surrounding land use" either multi-family or office zoning was reasonable. (Tr. 79; 85.) However, when the Hirt property is analyzed in light of all factors that affect development, office zoning does not allow for an economically viable use of the property. (Tr. 85-87.)

On appeal, the Court of Appeals reversed the trial court's judgment. The appellate court framed petitioners' burden as follows:

> "The plaintiffs carry the burden of proving, beyond fair debate, that the zoning classification of OB [Office] is unreasonable and not necessary to the health, safety and welfare of the City. *Karches* v. *Cincinnati*, 38 Ohio St.3d 12, 19, (1988) (citations omitted). The plaintiffs must demonstrate that the zoning classification denies them the economically viable use of their land without substantially advancing a legitimate government interest. *Id.*"

(Appendix B at page 6a.)

The Court of Appeals' decision recited the abundance of testimony presented that the property was not capable of being economically developed under the office zoning classification. (Appendix B, pages 6a-8a.) However, because the City presented testimony that, from a planning perspective, the "OB [Office] zoning was an appropriate use of the subject parcel" and "would aid in the City's important objective of creating a town center" and "that the subject parcel is the last large undeveloped piece of land in the town center and its use should be given considerable thought," the Court of Appeals found, under the *Karches* v. *Cincinnati* standard, *supra*, that the constitutionality of the zoning ordinance as applied to the Hirt property was fairly debatable. (Appendix B, page 9a.)

The Supreme Court of Ohio overruled petitioners' motion for an order directing the Court of Appeals to certify its record on October 21, 1992. (Appendix A)

ARGUMENT

I. A ZONING REGULATION THAT DENIES AN OWNER THE ECONOMICALLY VIABLE USE OF HIS PROPERTY BUT SUBSTANTIALLY ADVANCES A LEGITIMATE GOVERNMENTAL INTEREST IS CONSTITUTIONAL AS APPLIED TO THAT PARTICULAR PROPERTY ONLY IF A METHOD OF PAYING JUST COMPENSATION TO THE PROPERTY OWNER IS PROVIDED.

This case presents a question that is the opposite of that presented in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. ____, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992). In the *Lucas* case, the property owner did not challenge the validity of the South Carolina regulation that deprived him of the reasonable economic use of his property. In this case, petitioners challenged the City of Strongsville's zoning ordinance that restricts the uses of petitioners' property to office uses and the trial court found as a fact that the zoning regulation deprives them of the reasonable economic use of their property. However, the courts of Ohio found that the zoning ordinance was constitutional notwithstanding the fact that no method of compensating the property owner for the deprivation is provided under Ohio law.

The Ohio Supreme Court's test for determining the constitutionality of a zoning ordinance as applied to a particular piece of property requires consideration of two separate, but related, prongs. *See*, *Columbia Oldsmobile* v. *City of Montgomery*, 56 Ohio St.3d 60, 62, 564 N.E.2d 455 (1990), *cert. denied*, 111 S.Ct. 2854 (1991); *Karches* v. *Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). First, Ohio courts must decide if the zoning classification denies a property owner the reasonable economic use of the subject property. Second, if the zoning does deny the property owner the reasonable economic use of the property, the court determines whether the zoning classification substantially advances a legitimate governmental purpose. If the court finds

that the zoning ordinance as applied to the subject property does substantially advance a legitimate governmental purpose, the ordinance is found to be constitutional, despite the fact that it deprives the property owner of the beneficial use of the property. This standard was applied by the Court of Appeals in the present case. (Appendix B, at page 6a)

The Ohio Supreme Court has consistently applied this two-pronged test in deciding whether a zoning regulation is constitutional as applied to a specific piece of property. *See, Columbia Oldsmobile* v. *City of Montgomery, supra; Mayfield-Dorsh, Inc.* v. *South Euclid*, 68 Ohio St.2d 156, 429 N.E.2d 159 (1981); *Superior Uptown, Inc.* v. *Cleveland*, 39 Ohio St.2d 36, 313 N.E.2d 820 (1974). In light of this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. ____, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992), the validity of the Ohio standard for determining whether a zoning ordinance's application to a specific piece of property constitutes a taking under the Fifth Amendment without providing a method of compensation to the property owner is at issue.

Lucas "described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Id.*, 120 L.Ed.2d at 812. One of those categories where the Court has found "categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."[5] *Id.*, 120 L.Ed.2d at 813. As a result, if a plaintiff demonstrates that the land use regulation deprives him of all reasonable economic uses, he is entitled to compensation for the taking.

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[5] The Supreme Court cited several earlier cases to support this analysis, including *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922); *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. 470, 495 (1987); and *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296 (1981).

In the present case, petitioners challenged the constitutionality of the City of Strongsville's zoning ordinance as it applied to their property. The trial court found as a matter of fact that office uses were not economically feasible on that particular piece of property. Notwithstanding the *Lucas* decision,[6] the Ohio courts, in applying the two-prong test, found that the zoning ordinance was constitutional as applied to petitioners' property.

Neither Ohio nor Strongsville provides a method of compensating a property owner whose land has been deprived of all reasonable economic usefulness in the advancement of a legitimate governmental interest through a land use regulation. The Ohio courts have not recognized a property owner's right to compensation for a regulatory taking. In *McKee* v. *City of Akron*, 176 Ohio St. 282, 285, 199 N.E.2d 592 (1964), the Ohio Supreme Court held that:

> "[o]rdinarily in order to constitute a taking, the governmental activity must physically displace a person from space in which he was entitled to exercise dominion consistent with the rights of ownership."

The Court recognized in that case that "physical displacement is not always necessary." However the two cases the Court cited as examples for that proposition did not involve regulatory takings. The Ohio Supreme Court found a taking in *State, ex rel. Royal* v. *City of Columbus*, 3 Ohio St.2d 154, 209 N.E.2d 405 (1965), *cert. denied*, 383 U.S. 925 (1966) which involved "airflights so low and so frequent as to be a direct and immediate interference with enjoyment and use of the land." *Id.*, at syllabus ¶1. The Ohio Supreme Court has been unwilling to extend the *Royal* case beyond its particular

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[6] The *Lucas* decision was rendered on June 26, 1992. The Court of Appeals' decision in the present case was rendered prior to *Lucas* on May 7, 1992. The Ohio Supreme Court denied petitioners' motion for an order directing the Court of Appeals to certify its record on October 21, 1992.

facts. *State, ex rel. Fejes* v. *City of Akron*, 5 Ohio St.2d 47, 213 N.E.2d 353 (1966). Ohio courts of appeals have consistently followed the reasoning in *McKee* v. *City of Akron*, *supra*, and denied a property owner compensation where there was no physical intrusion upon his property. *See*, *State, ex rel. Pitz* v. *Columbus*, 56 Ohio App. 3d 37, 42, 564 N.E.2d 1081 (Franklin County 1988), *juris. denied*, 41 Ohio St.3d 729 (1989); *Miller* v. *PPG Industries*, 48 Ohio App.3d 20, 23, 547 N.E.2d 1216 (Pickaway County 1988); *In re Leas*, 5 Ohio App.3d 120, 123, 449 N.E.2d 780 (Jefferson County 1981).

Clearly, under *Lucas*, the Ohio standard that allows a municipality to take the economic value from a piece of property if a substantial governmental interest is served thereby must provide a method for compensating the property owner for such deprivation.

Because neither the Strongsville zoning ordinance nor Ohio law provides a method for compensating a property owner who is denied the reasonable economic use of his property by a zoning ordinance that arguably advances a legitimate governmental interest, the zoning ordinance as applied to petitioners' property is unconstitutional.

CONCLUSION

A zoning regulation that denies an owner the economically viable use of his property but arguably advances a legitimate governmental interest is constitutional as applied to that particular property only if a method of paying just compensation to the property owner is provided.

Because Ohio law does not provide a method of compensating a property owner who has been so deprived, the Ohio Supreme Court's use of the two-pronged test as applied in the *Karches* and *Columbia Oldsmobile* cases, *supra*, is invalid.

Petitioners ask this Court to issue a Writ of Certiorari to review the judgments of the Ohio courts to clarify the obligation of a municipality to pay compensation to a property owner when land is taken under the guise of advancing a legitimate governmental purpose.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO
1992 TERM
To wit: October 21, 1992

Case No. 92-1319

Arthur Hirt et al.,

Appellants,

v.

City of Strongsville, Ohio,

Appellee.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:
Motion Fee, $40.00, paid by Manley, Burke & Fischer.

(Court of Appeals No. 60061)

/s/ THOMAS J. MOYER
Chief Justice

APPENDIX B

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 60061

ARTHUR HIRT, ET AL.
Plaintiff-appellees

vs.

CITY OF STRONGSVILLE, OHIO,
Defendant-appellant

JOURNAL ENTRY AND OPINION
MAY 7, 1992

CHARACTER OF PROCEEDING: Civil appeal from Court of Common Pleas Case No. 163209

JUDGMENT: REVERSED AND JUDGMENT ENTERED FOR APPELLANT.

DATE OF JOURNALIZATION: _____

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PATTON, P.J.,

Defendant-appellant, the City of Strongsville ("City"), appeals from the trial court's decision declaring the existing zoning on plaintiff-appellees Hobart, Onalee and Arthur Hirt's property unreasonable, arbitrary and unconstitutional. Plaintiffs challenged the validity of the current office zoning classification on their 42.6 acre site located in the City as the present zoning did not allow them a reasonable economic use of their property. The plaintiffs successfully argued below that the property's most reasonable use in the immediate future is multi-family dwellings (i.e., apartments).

The relevant facts follow: The subject property, located in the City of Strongsville, with the south side fronting Route 82, was originally zoned R1-75, which permits the construction of single-family detached residential units. On March 27, 1990, during the pendency of this declaratory judgment action, the property was rezoned to permit office buildings, OB. At the time of trial, the construction of the headquarters of Central Reserve Life was underway adjacent to the subject property on its east side. Land adjoining the property to the west is a 158-unit apartment complex. The property on the opposite side of Route 82 is zoned to permit the construction of a shopping center.

Prior to this property being rezoned OB, the National Land Development Company ("National Land") entered into two contracts with the plaintiffs to purchase this property. The

contracts, however, were contingent upon the property being rezoned from single-family detached residential to multi-family residential. After numerous studies and extensive research, National Land concluded that the only reasonable use of the property was multi-family dwellings.

In April of 1988, National Land applied to the City for a zone change from R1-75 to RMF-1, multi-family residential. The City's planning commission recommended approval, but the City Council rejected the proposal.

The plaintiffs then instituted this action and alleged that the present zoning of the plaintiffs' property is unreasonable, arbitrary, confiscatory and, hence, unconstitutional. Count II alleged the City had approved a high-density apartment complex immediately to the west of the subject property. Count III alleged a § 1983 cause of action that the plaintiffs were deprived of the reasonable use of their property.

The trial court, after entertaining extensive testimony on this matter, entered findings of fact and concluded that:

> Considering all of the evidence and testimony presented at trial, the Court finds as a matter of law that the plaintiff has proven that its land could not be profitably developed as single or multi-office space in the foreseeable future; that the zoning ordinance as applied to the plaintiff is clearly invalid beyond fair debate. *Central Motors Corp.* v. *Pepper Pike*, 13 O.O. 3d 347 (1979).
>
> IT IS, THEREFORE, CONSIDERED, ADJUDGED, ORDERED AND DECREED that the present zoning on P.P. No. 396-11-001 and No. 396-11-002 (Office/Building) is clearly invalid, beyond the scope of fair debate; that the most reasonable use of said property in the immediate future is multi-family dwellings; and that the Defendant, City of Strongsville, is ordered to enact rezoning legislation forthwith to carry out the judgment of this Court. Costs to Defendant, City of Strongsville.

The City's timely appeal asserts three errors for review by this court:

I. THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS THE COMPLAINT AND ENTER JUDGMENT IN FAVOR OF THE CITY OF STRONGSVILLE AFTER APPELLEES WERE UNABLE TO DEMONSTRATE BEYOND FAIR DEBATE THAT THE ZONING OF THE APPELLEES' PROPERTY WAS CLEARLY ARBITRARY AND UNREASONABLE.

II. THE TRIAL COURT ERRED WHEN IT SUBSTITUTED ITS JUDGMENT FOR THAT OF THE DULY ELECTED COUNCIL OFFICIALS OF THE CITY OF STRONGSVILLE AS TO A REASONABLE ZONING FOR THE APPELLEES' PROPERTY.

III. THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS THE COMPLAINT AND ENTER JUDGMENT IN FAVOR OF THE CITY OF STRONGSVILLE AFTER APPELLEES FAILED TO PRESENT EVIDENCE THAT THEIR CONSTITUTIONAL RIGHTS WERE DEPRIVED.

The City argues the trial court erred and usurped its authority in ordering it to rezone the subject property. The City's arguments are interrelated so they will be addressed together.

A.

In particular, the City contends the plaintiffs did not demonstrate, beyond fair debate, that the zoning classification is unreasonable and not necessary to the health, safety and welfare of the community. Hence, the City avers the trial

court erred in not deferring to the legislative body (the City Council) and in substituting its judgment for that of the City Council.

The plaintiffs carry the burden of proving, beyond fair debate, that the zoning classification of OB is unreasonable and not necessary to the health, safety and welfare of the City. *Karches* v. *Cincinnati* (1988), 38 Ohio St. 3d 12, 19 (citations omitted). The plaintiffs must demonstrate that the zoning classification denies them the economically viable use of their land without substantially advancing a legitimate government interest. *Id.*

The trial court found it beyond the fair reach of debate that the existing OB zoning as applied to the plaintiffs' property was unreasonable, arbitrary and confiscatory, and that the plaintiffs' land could not be "profitably developed" as a single or multi-office space in the foreseeable future.

The trial court found that the use for the property as currently zoned for office use was not economically feasible. We disagree and reverse the decision of the trial court.

The plaintiffs produced several witnesses in support of their position. Robert Westendarp, Chairman of the Board of National Land, testified that he entered into a contract with the plaintiffs for the purchase of the subject property contingent upon rezoning for multi-family dwellings. His research and studies revealed the subject property was not conducive to office development for several reasons. First, Westendarp stated "there is simply no market." (Tr. 38). Second, Westendarp explicated that the market rates for leasing in the area are $12 per square foot. He would have to charge $19 per square foot "just to break even." (Tr. 39.) Third, financing for office building development on the subject property is not feasible, mostly because of its location. This leads into Westendarp's fourth reason that the property itself is not conducive to office development. There is no "highway visibility." (Tr. 30.) Because of the physical characteristics of the subject property, only half of the frontage is usable as the other half is a ravine. (Tr. 30.) The ravine measures approximately sixty feet in depth and three hundred feet in width. (Tr. 24.) This very

feature makes this particular parcel attractive for multi-family dwelling development as it is a "great natural amenity." (Tr. 25.) Westendarp stated that the ravine effectively precludes the development of office buildings or a retail center. (Tr. 25.)

Moreover, Westendarp stated, prior to approaching the plaintiffs regarding the sale of the property, he reviewed the 1968 Comprehensive Master Plan for the City. The Plan was essentially authored by Robert Hill, the City Planner and defense witness. Review of the Master Plan revealed that the subject site was zoned for a multi-family site. (Tr. 20.) In 1988, the City formed a Master Plan Review Committee in order that the 1968 Master Plan could be updated and revised. (Tr. 34.) The report which was spawned by this committee concluded that any business rezoning for this piece of property "would be highly speculative" because of the City's "overall business potential in relation to its total acres of currently zoned business land." (Tr. 34-5, 78.)

David Hartt, a city planning consultant, testified there is clearly no market potential for office development at the subject site. (Tr. 66-67.) "[T]here is more land in the City zoned for economic development than jobs that will be available to fill it." (Tr. 70.) In response to questions from the bench, Hartt discounted the "satellite office development" theory which embodies the concept that offices are built around a retail shopping center such as the one being developed across Route 82 from the subject site. Hartt stated that many shopping centers in the area do not have satellite office development. (Tr. 91-2.) Hartt also stated that, in his opinion, multi-family dwellings on this parcel would be more aesthetically pleasing as less of the site would be used for buildings and parking and more of the natural character of the landscape would be retained. Hartt also stated that this area, known as the southwest corridor, is clearly not the kind of business "hub" as those on Rockside Road in Independence or Chagrin Boulevard and I-271, nor does the southwest corridor have the capabilities and potential for such growth. (Tr. 89.)

Donald Lyden, a leasing consultant at Ostendorf-Morris

Company, also testified. Ostendorf-Morris is the largest commercial real estate firm in northern Ohio which completes over 70% of the brokered transactions in the Cleveland market. Lyden corroborated the testimony of Westendarp and Hartt and concluded that it would not generally be a "smart idea" as "an office building on this site of any type would be uneconomical [and] unfeasible from a leasing standpoint * * *." (Tr. 98.) Lyden opined that the location is "the biggest strike against the parcel." (Tr. 108.) He stated that financing for an office building on this site could probably not be obtained; there would not be enough tenants to attract; and even if financing were obtainable, the building, in all probability, could not be leased. (Tr. 101.)

Richard Van Curen, a real estate appraiser, also testified. His opinions conformed to the testimony of the other witnesses produced by the plaintiffs. Van Curen stated that the most reasonable use of the subject parcel is for multi-family dwellings. There are no other major office buildings in the area. (Tr. 122.) Central Reserve Life is a single-user institutional facility (Tr. 59) and other buildings in the area are service-oriented, such as banks or a Kaiser facility. Van Curen did not see the southwest corridor as a business hub and concluded that if the current zoning remained, the development of this parcel of land would be halted in the foreseeable future. (Tr. 132.)

Norman Crumholz, the plaintiffs' last witness, is a professor of urban planning at Cleveland State University. He reviewed the 1968 Comprehensive Master Plan as well as the 1988 revised version, along with the accompanying notes and records, and averred that the intention of the City was to give "special emphasis to multi-family or apartment dwellings" in the subject area. (Tr. 139.) Crumholz concluded that the best and most reasonable use of the subject property is multi-family dwellings and there is clearly a "sufficient need" for apartments in the area. (Tr. 147.)

The City produced the testimony of Robert Hill, the City Planner and author of the 1968 Comprehensive Master Plan

for Strongsville. Hill is also the city planner for Independence, where a large hub of business activity is located, and is the planning consultant for the city of North Olmsted. North Olmsted has satellite development around Great Northern Mall. Hill testified that the present zoning would create a hub for business activity in the southwest corridor and such zoning is consistent with the City's comprehensive plan of development.

Hill stressed the significance of the new adjacent mall site in the area and the importance of the presence of the Central Reserve Life building in the immediate vicinity of the subject property. Further, Hill stated that the immediate vicinity is already zoned for office use and houses the Kaiser facility as well as banks and the Central Reserve Life building. Moreover, Hill testified that the roadway of Route 82 is undergoing plans for expansion in order to accommodate the business district. His considerable experience in city planning with not only Strongsville, but Independence and North Olmsted, coupled with a review of the City's comprehensive plan led Hill to conclude that OB zoning was an appropriate use of the subject parcel.

William Gould, an architect and city planner, testified next. Gould also stated that the current zoning is an appropriate use of the property and would aid in the City's important objective of creating a town center. (Tr. 211-13.) He also added that the subject parcel is the last large undeveloped piece of land in the town center and its use should be given considerable thought.

In this case, it is clearly not beyond the scope of fair debate that the existing zoning is unreasonable, arbitrary and confiscatory. In fact, quite the contrary affirmatively appears from the record. A fair debate ensued between plaintiffs' witnesses and the defense witnesses. It appears that the trial court substituted its judgment for that of the City Council and the City Planner, Hill.

Last, we note that counsel for plaintiff during the trial below and oral argument before this court misplaced the em-

phasis of his position. He presented testimony below and on appeal that there is no economically viable use of his property; hence, he is entitled to relief. First, the testimony belies this contention or at least creates a fair debate. Second, it is a well-established principle of law that "[t]he mere fact that one's property can be put to a more profitable use does not, in itself, establish an unnecessary hardship where less profitable alternatives are available within the zoning classifiction." *Consolidated Mgmt., Inc.* v. *Cleveland* (1983), 6 Ohio St. 2d 238.

Accordingly, the first and second assigned errors are well-taken.

B.

The City also maintains that the plaintiffs erroneously delegated their 42 U.S.C. § 1983 action to National Land and National Land lacks standing to pursue the § 1983 action as it is not the record owner of the subject property. This is simply not true.

The plaintiffs did not delegate their cause of action. Contrary to the statement made by the City, Westendarp of National Land did not testify as to the perceived harm to the company if the conditions to the real estate contract could not be met. The plaintiffs are correctly the real party in interest and the causes of action were properly maintained by them.

Accordingly, the third assigned error is overruled.

Judgment reversed and judgment entered for the City.

This cause is reversed and judgment entered for the appellant.

It is, therefore, considered that said appellant recover of said appellees its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES D. SWEENEY, J., PRYATEL, J.,* CONCUR.

/s/ JOHN T. PATTON
PRESIDING JUDGE

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* SITTING BY ASSIGNMENT: JUDGE AUGUST PRYATEL, retired of the Eighth Appellate District.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX C

IN THE COURT OF COMMON PLEAS
JUDGE JAMES J. McGRATH

CASE NO. 163209

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

ARTHUR HIRT, et al.
Plaintiff

vs.

CITY OF STRONGSVILLE, OHIO
Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ENTRY

(Filed June 11, 1990)

The Court having heard the evidence and testimony at trial makes the following Findings of Fact:

1. that the original zoning for single family occupancy was totally inadequate for the property which is the subject matter of this appeal;

2. that the rezoning by council of the property to OB (Office/Building) while subject to this Court's order was done primarily to accommodate the needs of the neighboring property owner, Central Reserve Life Insurance Company who had agreed to build and relocate their home office complex on the adjacent property, bringing with it approximately 350 home office employees;

3. that the addition of the home office complex of Central Reserve Life to the property tax duplicate and the attendant

employee income taxes would provide the City of Strongsville with its highest tax return from the adjacent Central Reserve Life Insurance property and its attendant employees;

4. that the likelihood of the City to recruit and land a similar home or regional office building complex and its attendant employees on the land which is the subject matter of this appeal is possible but it is extremely remote in light of the surrounding area development on Route 82;

5. that the development of office space adjacent to the proposed shopping center on Route 82, if it is in fact built, is likely to be "satellite development" which is service oriented re: fast food, car repair and maintenance, medical and dental etc. as opposed to multi-floor or office or individual office complexes;

6. that the successful development and occupancy return for such complexes on the land that is the subject matter of this appeal is economically prohibitive in light of the overabundance of non-service office space in the City of Strongsville;

7. that there is not an overabundance of multi-dwelling complexes in the City of Strongsville and the potential for successful development and occupancy of multi-family apartment complexes especially by people wishing to live and work in Strongsville is high;

8. that the successful development of the Hirt property as satellite office space, if in fact the shopping center is built, is remote by reason of location;

9. that in light of all the attending factors, the highest, best and most economical use of the Hirt property, absent the remote possibility of another Central Life Insurance Co. opportunity, is multi-family dwellings which, if built pursuant to City Building Codes, would not create undue safety or aesthetic conditions;

10. that in light of all the attending factors, the present zoning restrictions on the Hirt property to office development only is economically prohibitive, unreasonably restrictive and in effect would condemn the property to non development in the indefinite future;

11. that the validity of the ordinance is beyond the reach of fair debate and that the most reasonable use of the Hirt property in the immediate future is multi-family dwellings (apartment complex).

CONCLUSIONS OF LAW

Considering all of the evidence and testimony presented at trial, the Court finds as a matter of law that the plaintiff has proven that its land could not be profitably developed as single or multi-office space in the foreseeable future; that the zoning ordinance as applied to the plaintiff is clearly invalid beyond fair debate. *Central Motors Corp.* v. *Pepper Pike*, 13 O.O. 3d 347 (1979).

IT IS, THEREFORE, CONSIDERED, ADJUDGED, ORDERED AND DECREED that the present zoning on P.P. No. 396-11-001 and No. 396-11-002 (Office/Building) is clearly invalid, beyond the scope of fair debate; that the most reasonable use of said property in the immediate future is multi-family dwellings; and that the Defendant, City of Strongsville, is ordered to enact rezoning legislation forthwith to carry out the judgment of this Court. Costs to Defendant, City of Strongsville.

/s/ JAMES J. McGRATH
JUDGE

DATED: May 31st, 1990

[NOTICE OF SERVICE OMITTED]

APPENDIX D

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CASE NO. 163209
JUDGE JAMES McGRATH

ARTHUR HIRT, et al.,

Plaintiffs,

v.

CITY OF STRONGSVILLE, OHIO,

Defendant.

AGREED PARTIAL JUDGMENT ENTRY
(Filed January 30, 1990)

This matter came on for trial and for hearing on the following three motions:

1. Motion for Leave to File Motion to Dismiss Instanter (filed by Defendant);
2. Motion for an Order to Require Reasonable Zoning and Evidentiary Hearing (filed by Plaintiffs); and
3. Motion for Leave to File a Supplemental Complaint (filed by Plaintiffs).

The Court finds that the parties have stipulated and agreed as follows:

1. The zoning of the land in controversy in this case for R1-75 zoning use was reasonable and lawful at the time that such zoning was established.

2. Because of the changes in land use and changes in zoning in the area near the land in controversy in this case, the present R1-75 zoning of the land in controversy is no longer reasonable.

The Court further finds that the City of Strongsville has commenced the consideration of new zoning for the land in controversy during the pendency of this action.

The Court further finds that the parties have reached a partial settlement and agreed to a partial judgment entry on the issue of the present reasonableness of the existing zoning;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

1. The present zoning of land in controversy in this case for R1-75 zoning use is no longer reasonable;

2. To allow time for the rezoning of the property, this declaration of the invalidity of the present zoning shall not become effective until the 16th day of March, 1990;

3. The City shall rezone the property in controversy in this case before the 16th of March, 1990;

4. This case is set for trial on the 16th day of April, 1990, at 9:30 a.m. to determine the reasonableness of the new zoning applied to the plaintiffs' real estate by the defendant City;

5. The Plaintiffs are granted leave to supplement their complaint by the 27th of March, 1990, and parties shall present pretrial briefs to the court on or before the 12th of April, 1990;

6. This order either disposes of or moots the above motions; and

7. The court maintains continuing jurisdiction to review and supervise the rezoning process.

Dated: _____

_____
JUDGE JAMES McGRATH

APPROVED:

Robert E. Manley
Sally L. Cremeens-Strong

/s/ ROBERT E. MANLEY/by F.A.D.
Trial Attorney for Plaintiff

/s/ FRANK A. DiPIERO
Attorney for Defendant

/s/ JOHN D. RYAN/by F.A.D.
Attorney for Defendant

APPENDIX E

UNITED STATES CONSTITUTION
FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

CODIFIED ORDINANCES OF STRONGSVILLE, OHIO
PART TWELVE — PLANNING & ZONING CODE
SECTION 1260.01 to 1260.02

1260.01 INTENT.

Office Building Districts and their regulations are established herein in order to achieve, among others, the following purposes:

(a) To provide a zoning district devoted exclusively to professional services, funding and other similar financial services and the management of commercial, industrial, public and semipublic institutions;

(b) To protect adjacent residential areas by regulating the bulk and spacing of office uses, particularly at common boundaries; and

(c) To promote the most desirable land use and traffic patterns in accordance with the objectives of the Comprehensive Plan. (Ord. 1978-165. Passed 10-16-78.)

1260.02 USE REGULATIONS.

Buildings and land shall be used, and buildings shall be designed, erected, altered, moved or maintained in whole or in part, in Office Building Districts, only for the uses set forth in the following schedules and regulations.

(a) *Main Buildings and Uses Permitted.* Office buildings and offices, including professional, financial, governmental, public utility, executive, administrative offices and sales offices, provided that only samples are displayed or stored on the lot and that no goods are distributed therefrom;

(b) *Similar Main Uses Permitted.* Any other office use not listed above or in any subsequent use classification and determined to be similar by the Planning Commission in accordance with the standards set forth in Section 1242.08; and

(c) *Accessory Uses Permitted.* Any accessory use which is incidental to the main uses, provided that it is planned and developed integrally with the main building and

that it has no injurious effect on adjoining use districts, such as:

(1) Storage garages and off-street parking areas for employees and customers as required in Chapter 1270;

(2) Maintenance and storage facilities;

(3) Employee lunch rooms; and

(4) Signs, including business, identification, professional nameplate, directional, real estate and project signs, subject to the regulations set forth in Chapter 1272. (Ord. 1978-165. Passed 10-16-78.)

(2)

Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

No. 92-1221

IN THE

Supreme Court of the United States

October Term, 1992

ARTHUR HIRT, ONALEE HIRT
and HOBART HIRT,
Petitioners,

vs.

CITY OF STRONGSVILLE, OHIO,
a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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No. 92-1221

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

On January 12, 1989, Petitioners filed a complaint for declaratory and injunctive relief, and relief under 12 U.S.C. §1983, in the Court of Common Pleas, Cuyahoga County, Ohio, against the City of Strongsville, Ohio ("City"). Petitioners sought a declaration that the zoning then existing on their property was unreasonable,

arbitrary and unconstitutional. After hearing evidence on April 16, 1990, the trial court issued its Findings of Fact, Conclusions of Law and Judgment Entry on or about June 1, 1990, wherein it held that the zoning on the property at the time of trial was invalid. The court ordered the City to enact new zoning legislation to permit the development contemplated by The National Land Development Company ("National Land"), a developer which had an interest in Petitioners' property (Petitioners' Appendix C).

On May 17, 1992, the Eighth District Court of Appeals, Cuyahoga County, Ohio, reversed and entered judgment for the City (Petitioners' Appendix B). The Court of Appeals "disagree[d]" with the trial court's conclusion that use of the property as zoned at the time of trial was not economically feasible, finding that, at most, Petitioners established their property could not be as profitably developed as National Land had hoped (Petitioners' Appendix at 6a, 10a). Consistent with longstanding precedent of this Court and of the Ohio Supreme Court, the Court of Appeals held that even if the ordinance at issue prevented the *most* profitable use of the property, such a consequence, in itself, is insufficient to invalidate the ordinance (Petitioners' Appendix at 10a). Further, in response to Petitioners' assertion that the existing zoning was unreasonable, arbitrary and confiscatory, the Court of Appeals held that "quite the contrary affirmatively appears from the record" (Petitioners' Appendix at 9a).

The Ohio Supreme Court overruled Petitioners' motion for an order directing the Court of Appeals to certify its record (Petitioners' Appendix A).

STATEMENT OF THE CASE

Petitioners own two contiguous parcels of property comprising 42.6 acres of land ("the Hirt property") in Strongsville, Ohio. The property fronts on Royalton Road (a five-lane highway), 0.7 miles to the west of an interchange with a major interstate highway (Interstate 71) (Tr. at 20, 54). At the time this action was commenced, the property was zoned RI-75, which limited development to single-family dwellings and certain public service uses (Petitioners' Appendix D). A single-family home owned by Petitioner Hobart Hirt is situated on one of the parcels comprising the Hirt property. The other parcel is vacant (Tr. at 149, Exhibit 1).

In late 1987 and early 1988, National Land, which is not a party to this action, entered into contracts to purchase the Hirt property, contingent upon it being rezoned from RI-75 to multi-family residential (Tr. at 20-21). In April 1988, National Land filed an application for a change in zoning on the property from RI-75 to the Multi-Family 1 (RMF-1) classification (Tr. at 22). National Land proposed to construct a multi-family housing and apartment complex on the property (Tr. at 22-23). Strongsville's City Council unanimously rejected the proposed zoning change ordinance at its meeting on December 5, 1988 (Tr. at 28). The complaint was filed on January 12, 1989.

On January 30, 1990, the trial court entered an agreed order finding that the RI-75 zoning, reasonable and lawful at the time the zoning was established, was no longer reasonable due to changes in land use and zoning in the area near the property (Petitioners'

Appendix D).[1] The Hirt property was rezoned to the OB (Office Building) classification on March 27, 1990 (Tr. at 167-68).

There is ample evidence in the record demonstrating that Council's decision to adopt the OB zoning classification was properly supported by relevant land use planning criteria. Council's decision was based on recommendations emanating from lengthy deliberations of various committees, boards and commissions responsible for zoning issues, and the underlying data considered by those bodies. Those deliberations had begun months before the complaint was filed.

At trial, Robert C. Hill, Strongsville's City Planner since 1960, testified that he aided in the preparation of the City's 1968 Comprehensive Master Plan, which chartered for a period of 20 years the City's future development plans (Tr. at 163-64). As early as 1972, on two occasions, Mr. Hill recommended the Hirt property be rezoned for office use (Tr. at 171).

Beginning in August 1988, Mr. Hill and other City officials reviewed the 1968 Comprehensive Master Plan and began formulating recommendations regarding how the plan should be revised and updated (Tr. at 164-65). After more than a year of review, on September 26, 1989, the Master Plan Review Committee recommended that the Hirt property be rezoned for office use (Tr. at 165-66). On December 14, 1989, the City Planning

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[1] One such change was the rezoning of a 22 acre parcel immediately east of the Hirt property to "Office Building" and the construction of a 120,000 square foot office building for the Central Reserve Life Insurance Company (Tr. at 170). In addition, longstanding plans for the building of a large shopping mall across Royalton Road and just to the east of the Hirt property had been formalized and were moving forward, as evidenced by the developers' submission of an application for development of that property (Tr. at 195).

Commission also recommended that the Hirt property be rezoned to office building use (Tr. at 167-68). These recommendations were based on relevant data submitted to the committees throughout the course of the review period (referenced in the City's trial Exhibits A-L, Tr. at 220). The Hirt property was rezoned to the OB classification in March 1990, eighteen months after review of the 1968 Comprehensive Master Plan had begun.

Mr. Hill testified that the rezoning of the property to office use was an appropriate reasonable use for that property. He concurred with Council's view that the property is located in a strategic and vital area of the City. The location of Interstate 71 to the east of the property creates the greatest potential of any area in Strongsville for a business hub (Tr. at 168-69). City officials concluded that the construction by Central Reserve Life Insurance Company of a 120,000 square foot office building headquarters to the immediate east of the Hirt property will generate and attract similar development (Tr. at 168-69).

The immediate vicinity of the Hirt property is primarily dedicated to office development, including a Kaiser Health Care facility, a bank, and an executive office park. The construction of a state-of-the-art shopping mall across the street and just to the east of the Hirt property, which development will include 385,000 square feet of office space area, also is expected to attract office building development to the Hirt property (Tr. at 168-70, 175, 180-81).

Since 1987, approximately 200,000 square feet of new office development has occurred in Strongsville—a strong indicator to City officials of the viable office market in Strongsville (Tr. 175). The Hirt property is

considered by the City planners to be on the future business corridor of Strongsville (Tr. at 179), and constitutes an attractive location for continued development of corporate office space or multi-tenant offices (Tr. at 184-85). It is the judgment of Strongsville's officials that the Hirt property is the prime area within Strongsville for significant office building development into the future (Tr. at 185).

While Strongsville's Master Plan Review Committee considered multi-family development for the Hirt property, it rejected such a use and instead recommended office use development. In addition to the other information analyzed during its review of the Master Plan, the Committee viewed the future business office development potential generated by the nearby presence of Central Reserve Life Insurance Company, as well as the availability and development of other apartment units elsewhere, as significant (Tr. at 185-86, 200).

At trial, William Gould, an architect and city planner specially hired by the City to review the Hirt property and this zoning issue (Tr. at 210), also testified. Mr. Gould explained that communities such as Strongsville develop their zoning from a master plan and that Strongsville had demonstrated a good history of planning in the past by preparing a comprehensive plan which designated the area where the Hirt property is located as the "Town Center" (Tr. at 212-13). Based on his comprehensive review and study, Mr. Gould recommended to the City that it was more appropriate to rezone the Hirt property for office use rather than multi-family development. The Hirt property is "the last large piece of undeveloped land in the Town Center area," and

for future planning of the City, office use development would be the optimal use to promote the concept of a Town Center (Tr. at 213).

Petitioners ignore the foregoing evidence in an attempt to convince this Court that the City had no basis to conclude that office use was a reasonable zoning classification for the Hirt property. The lengthy deliberation on these issues by the City Planner, the Master Plan Review Committee, the Planning Commission and City Council, and the vast experience of those persons and bodies, amply demonstrated otherwise to the Eighth District Court of Appeals.

Despite Petitioners' suggestion that they have been denied "all economically viable use of their property," the actual evidence "belies this contention" (Petitioners' Appendix at 10a).[2] Each of Petitioners' witnesses who testified on this topic admitted that their testimony was limited to the economic viability of developing a *Class A, multi-tenant, speculative office building* on the Hirt property in the near future (Tr. at 48, 83-84, 104-05).[3] None of Petitioners' witnesses testified that all other potential uses permitted under the OB classification were economically infeasible (Petitioners' Appendix at 18a-19a).

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[2] The Petition itself reveals that Petitioners have not been deprived of *all* economic use of their property. Petitioners' "Question Presented," for example, suggests denial of "the reasonable economic use of the property" (Petition at I), while elsewhere Petitioners frame this case in terms of their purported loss of "an economically viable use of the property." (*id.* at 10 n.4), or of their inability to "economically develope[ ]" the property (*Id.* at 6, 7).

[3] For example, Donald Lyden testified to the limited scope of Petitioners' presentation at trial as follows:

(Footnote continued on following page.)

There is nothing about the Hirt property that would not physically support an office building for a primary tenant (Tr. at 184-85). Appellees' witnesses also agreed that from a traditional planning perspective, office use is a reasonable use of this land (Tr. at 79).

Finally, there was no testimony or finding that the property was rendered "valueless" by reason of the zoning ordinance at issue. None of the witnesses testified about the relative market values of the Hirt property as subject to multi-family, office building, or any other zoning classification.

(Footnote continued from preceding page.)

Q. Mr. Lyden, it is your opinion then, the speculative multi-tenant Class A office facility should not be built on this piece of property; is that right?

A. Yes, sir.

Q. And your definition of a Class A building, that includes what, a fitness center?

A. Yes.

Q. Conference facility?

A. Yes.

Q. Food service?

A. Yes.

Q. You called it, I believe, a showcase property?

A. Yes.

(Tr. at 104-05).

REASONS FOR DENYING THE WRIT

I. The Issues Raised In The "Question Presented" By Petitioners Will Not Be Before The Court If Certiorari Is Granted.

The record is clear that Petitioners did not prove, nor did they attempt to prove, that the city's OB zoning classification as applied to their property denied them *all* economically viable use of the land. Nor did they attempt to show that their land was rendered valueless by reason of the OB zoning ordinance. At most, Petitioners established that the land could *most profitably* be developed with a multi-family apartment complex, and that it was not economically feasible to construct a "showcase" office building on their land. Petitioners did not establish that other uses permitted under the OB zoning classification could not be economically developed on the property. Petitioners presented no evidence whatsoever that the value of the land itself was affected—let alone adversely affected—by reasons of the adoption of the OB zoning classification by Strongsville's City Council.

For these reasons and others described below, this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. _____, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), would not have affected the manner in which the Court of Appeals analyzed the constitutionality of the ordinance at issue, nor did the announcement of that decision require the Ohio Supreme Court to review the Court of Appeals' holding. Petitioners cannot demonstrate on this record that the Court of Appeals' decision, or the Ohio Supreme Court's refusal to review that decision, was contrary to anything stated in *Lucas*.

As recognized by Petitioners (Petition at 13 n.5), *Lucas* relied on this Court's Fifth Amendment Taking Clause jurisprudence since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), when it held that if a newly enacted land use regulation deprived a property owner of *all* economically beneficial or productive use of the land, compensation was required "without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 120 L. Ed. 2d at 812. If property owners cannot demonstrate that application of the challenged land use regulation rendered their property valueless, then the owners cannot take advantage of the "categorical treatment" accorded the owner in *Lucas*. In such situations, the tests articulated in this Court's regulatory takings cases, none of which were overturned by *Lucas*, continue to apply. *Id.* at 815 n.8.

This case in no manner resembles *Lucas*. First, the South Carolina Beachfront Management Act at issue in *Lucas* prohibited the building of any permanent habitable structure on Lucas' property. *Id.* at 807. Strongsville's OB zoning classification is not, of course, so severe. The Hirt property actually was up-zoned from RI-75 to OB, and the single-family home on Petitioner Hobart Hirt's property continues to be occupied.

Second, at the time Lucas purchased his land, there were no regulations prohibiting the development he envisioned for the property. *Id.* at 808. Subsequent to Lucas' purchase, the Beachfront Management Act was adopted, preventing the development activity he proposed. Here, the zoning ordinances which prohibited multi-family development were in effect since the adoption of the City's 1968 Comprehensive Master Plan, well before National Land targeted the Hirt property for development (Petition at 4-5; Tr. at 154).

Finally, it was found in *Lucas* that application of the Beachfront Management Act to Lucas' property rendered his property "valueless." *Lucas*, 120 L. Ed. 2d at 807. There is no finding in this case that application of the OB zoning classification to the Hirt property rendered that property valueless. There is simply no evidence in the record that "the last large undeveloped piece of land in [Strongsville's] town center" (Petitioners' Appendix at 9a) is devoid of any value—including all market value and resale potential—as was the case with Lucas' property. *Lucas*, 120 L. Ed. 2d at 824 (Kennedy, *J.*, concurring).

Lucas reaffirmed that if a property owner suffers less than a total loss of economically productive use of his land, then the test of constitutionality articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), continues to apply. *Lucas*, 120 L. Ed. 2d at 815 n.8. The *Penn Central* test is the basis of the Ohio rulings, challenged here by Petitioners, requiring owners contesting the constitutionality of a zoning regulation to "demonstrate . . . that the zoning classification denies them the economically viable use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community" in order to prevail. *Columbia Oldsmobile, Inc. v. Montgomery*, 56 Ohio St. 3d 60, 62, 564 N.E.2d 455, 457 (1990), *cert. denied*, 115 L. Ed. 2d 1022 (1991); *Karches v. Cincinnati*, 38 Ohio St. 3d 12, 19, 526 N.E.2d 1350, 1357 (1988). *See Penn Central, supra*, 438 U.S. at 125 ("in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that

destroyed or adversely affected recognized real property interests.") (citations omitted). *See also Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980) ("Although no precise rule determines when property has been taken, . . . the question necessarily requires a weighing of private and public interests.") (citation omitted); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926).

As noted, the Eighth District Court of Appeals held that the OB zoning ordinance did not deny Petitioners the economically viable use of their land and that the ordinance substantially advanced legitimate government interests (Petitioners' Appendix at 6a, 9a-10a). The court also held that " '[t]he mere fact that one's property can be put to a more profitable use does not, in itself, establish' " the owners' entitlement to relief (Petitioners' Appendix to 10a).[4] Because the Court of Appeals properly applied the well-settled legal standards employed in this Court and by Ohio courts for decades to determine the constitutionality of zoning ordinances, and because *Lucas* did not modify that settled law in cases in which the economic impact on the property is less than total, the announcement of the *Lucas* decision did not create the need for the Ohio Supreme Court to review the Court of Appeals' ruling, and certiorari need not be granted here.

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[4] This holding is consistent with *Penn Central, supra*, in which it was confirmed "that diminution in property value, standing alone, can[not] establish a 'taking.' " 438 U.S. 104 at 131; *See also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

II. This Is Not An Appropriate Case To Address The Issue Presented.

The Petition should also be denied because Petitioners ask this Court to render an advisory opinion.

Petitioners seek for this Court to instruct the Ohio Supreme Court how it should rule if it ever considers a case in which owners pray for damages for the denial of the use of their property occasioned by application of a zoning ordinance which advances legitimate government interests. As established above, that question cannot be considered on this record, given that Petitioners have not established the "elimination of economic usefulness" which is the foundation of the question they present.

The issue raised in Petitioners' "Question Presented" has not been squarely before the Ohio Supreme Court since this Court's ruling in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987), in which it was held that a landowner must receive compensation if a land use regulation deprived the owner of all use of its property, even if the deprivation was temporary. *Id.* at 318. The Ohio Supreme Court did recognize in *Karches, supra,* that *First English* may have entitled the property owners to damages "for the taking that occurred before the ordinance was invalidated" in that case, but this issue was not considered because the property owners had not appealed the trial court's denial of their claim for damages. 38 Ohio St. 3d at 21, 526 N.E.2d at 1359. It is instructive, however, that the Ohio Supreme Court did not rely on any of the cases cited in the Petition to reject summarily the viability of such a claim.[5]

[5] Contrary to Petitioners' assertion, the Ohio Supreme Court has recognized that land use regulations may affect a taking if the regulations go too far. *See, e.g., State ex rel. Killeen Realty Co. v.*

(Footnote continued on following page.)

Finally, the Ohio Court of Appeals' cases cited at page 15 of the Petition failed to award compensation to the landowners not because there was no "physical intrusion," as Petitioners suggest, but because no "takings" had occurred under well-settled principles applied consistently with this Court's decisions.[6]

(Footnote continued from preceding page.)
East Cleveland, 169 Ohio St. 375, 380, 160 N.E.2d 1, 5 (1959) ("*At some undefinable point, regulation of property shades into taking of property*, which must be compensated. . . .' "); *Negin v. Board of Bldg. and Zoning Appeals*, 69 Ohio St. 2d 492, 497, 433 N.E.2d 165, 169 (1982) ("The rendering of such a lot useless for any practical purpose [by application of a zoning ordinance] goes beyond mere limitation of use and becomes a confiscation."); *McKee v. Akron*, 176 Ohio St. 282, 285, 199 N.E.2d 592, 594 (1964) ("Physical displacement is not always necessary. A taking may also be found where it is clear that the injury sustained by a person differs substantially in kind from that sustained by others in the neighborhood, even though there has been no physical displacement."), *overruled on other grounds, Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

There is nothing to indicate that the Ohio Supreme Court, when it directly considers the question posited here by Petitioners, would ignore *First English's* directive to award compensation for the temporary period of time, prior to judicial invalidation, during which an unconstitutional regulation burdened the property, or for the permanent taking which would result if the government refused to change the regulation after it is found to be unconstitutional.

[6] *See State, ex rel. Pitz v. Columbus*, 56 Ohio App. 3d 37, 41-42, 564 N.E.2d 1081, 1086 (Franklin County 1988) (court recognized that there "need not be physical taking . . . or even dispossession" in order for a "taking" to have occurred, but decline in market value, standing alone, is "not enough to constitute a 'taking' which would require compensation"), *juris. denied*, 41 Ohio St. 3d 729 (1989); *Miller v. PPG Indus.*, 48 Ohio App. 3d 20, 23, 547 N.E.2d 1216, 1219 (Pickaway County 1988) (owner's third assignment of error, which alleged that the trial court erred when it found that a land use regulation "which decreases land value is not a 'taking' under . . . the Ohio Constitution," overruled); *In re Leas*, 5 Ohio App. 3d 120, 123, 449 N.E.2d 780, 784 (Jefferson County 1981) ("Proof that [owner's] property was damaged is not in itself enough to entitle her to compensation").

CONCLUSION

This is a traditional zoning dispute in which the Petitioners asserted in the trial court that their property had been unduly burdened by the land use legislation at issue, and sought to have that legislation declared unconstitutional. Petitioners did not establish that their land was rendered valueless by reason of the zoning ordinance, or that they were deprived of all economic use of the property. Thus, the Eighth District Court of Appeals properly employed a balancing test in which diminution of the value (or profit potential) of the property was relevant but not controlling, and in which the strength of the public purpose underlying the ordinance was considered. Such an approach is fully consistent with this Court's jurisprudence on this subject. It is respectfully submitted, therefore, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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